International Brotherhood of Electrical Workers Local Union 71 *and* Thompson Electric, Inc. and International Union of Operating Engineers, Local 18, AFL-CIO. Case 08–CD–133004

June 30, 2015

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Thompson Electric, Inc. (the Employer) filed a charge on July 18, 2014, alleging that International Brotherhood of Electrical Workers Local Union 71 (Electrical Workers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Electrical Workers rather than to employees represented by International Union of Operating Engineers, Local 18, AFL–CIO (Operating Engineers). A hearing was held on October 22, 2014, before Hearing Officer Roberta A. Montgomery. Thereafter, the Employer, Electrical Workers, and Operating Engineers filed posthearing briefs. Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is a Munroe Falls, Ohio–based electrical contractor performing both inside electrical work in residential and commercial units and outside electrical work, including the installation of highway and streetscape lighting. The parties stipulated that during the 12-month period prior to July 18, 2014, the Employer purchased goods from outside the State of Ohio valued in excess of $50,000 and performed services in states other than the State of Ohio valued in excess of $50,000. The parties further stipulated that the Employer is an employer within the meaning of Section 2(2) of the Act, and we find that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties additionally stipulated, and we find, that Electrical Workers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

Since 1999, the Employer has performed outside electrical work using employees represented by Electrical Workers in Lake, Ashtabula, Lorain, Geouga, and Cuyahoga counties in Ohio. The Employer is signatory to a collective-bargaining agreement between the Greater Cleveland Chapter National Electrical Contractors Association and Electrical Workers, which is effective by its terms from December 30, 2013, through December 28, 2014, and which contains a provision that automatically renews the agreement from year to year until changed or terminated. The Employer does not have a collective-bargaining agreement with Operating Engineers.

On December 15, 2011, Anthony Allega Cement Contractor, Inc. (Allega Cement), the general contractor on the Ohio Department of Transportation's Lake County highway improvement project, subcontracted to the Employer the work of removing existing light poles and towers, excavating and trenching for underground conduits, and installing new light poles, towers, and luminaries as part of that project. Allega Cement is signatory to the Ohio Highway Heavy agreement with Operating Engineers, which is effective by its terms from May 8, 2013, to April 30, 2017. That agreement covers "Highway Construction" and requires that "all subcontractors . . . be subjected to the terms and provisions of this Agreement."

To perform the subcontracted work, the Employer generally staffed the project site with three to four employees represented by Electrical Workers, consisting of a foreman, an operator, a journeyman traffic signal technician, and/or a groundman. Each employee performed manual labor as well as electrical work and occasionally operated equipment including skid steers (i.e., Bobcats), mini-excavators, backhoes, trenchers, bucket trucks, and digger derrick trucks affixed with augers.

On May 14, 2014,[1] Operating Engineers Business Agent Jack Klopman appeared at the project site, photographed the Employer's equipment, and asked who was operating that equipment. A day or two later, Allega Cement President John Allega (Allega) asked the Employer's Chief Estimator, Robert Mileski, to contact Operating Engineers regarding issues Operating Engineers had raised related to the Employer.

Mileski called Operating Engineers District Representative Donald Taggart, who stated that Allega Cement had an agreement with Operating Engineers that required Operating Engineers to operate all equipment of Allega

[1] All dates are in 2014 unless stated otherwise.

Cement and its subcontractors.[2] Taggart further stated that "anything with wheels, tracks . . . was under [Operating Engineers'] jurisdiction." Mileski asked what the Employer's options to resolve this dispute were, and Taggart responded that the Employer could "join" Operating Engineers or "have Allega [Cement's] people operate [the Employer's] equipment." The Employer rejected these proposals as contrary to its existing collective-bargaining agreement with Electrical Workers.

Mileski and Taggart placed several additional calls to each other in late May. In a voice message left for Mileski, Taggart expressed a concern that the Employer's employees who were operating equipment including booms, trucks, augers, and excavators were not receiving the correct prevailing wages under the Ohio Highway Heavy agreement. Taggart then suggested moving the Employer's equipment operators to Allega Cement's payroll on a temporary basis to allow Allega Cement to pay them the correct prevailing wage and to remit fringe benefits to Operating Engineers. In another telephone conversation, Taggart suggested that the Employer sign a project labor agreement with Operating Engineers for this project only. Mileski reported those suggestions to the Employer's President, Larry Thompson, who rejected them.

By letter dated June 10, Allega notified Mileski that Operating Engineers had filed a grievance against Allega Cement.[3] Allega stated that he expected the grievance would not be resolved but rather would go to arbitration, and that "at that point [Allega was] looking for [the Employer] to help [Allega Cement] in the fight." Allega expressed his belief that "this is a jurisdictional dispute," and he asked the Employer to "assist [Allega Cement] in whatever information [Allega Cement] will need to help support [the Employer's] argument that [Electrical Workers] has operating engineers in [its] agreement as [the Employer] proved" in 2009.[4] Additionally, Allega warned that should Operating Engineers prevail in arbitration, Allega Cement would deduct the cost of any award from the total due on the Employer's subcontract. Allega then suggested replacing the Employer's operator represented by Electrical Workers with members of Operating Engineers as "an easy solution." Allega said that that he believed he could convince Operating Engineers to accept this deal.

On June 12, Operating Engineers filed a grievance against Allega Cement, claiming that Allega Cement's subcontract with the Employer violated article XIV, paragraph 98 of the Ohio Highway Heavy agreement because the Employer was not signatory to that agreement.[5] The grievance cited article II, paragraphs 4 and 13, which require the use of operating engineers for the operation of construction equipment and impose a penalty paid to the first qualified applicant for the assignment of equipment to anyone other than operating engineers. Allega forwarded a copy of the grievance to Mileski. Thereafter, the Employer sent a copy of Allega's letter and the grievance to Electrical Workers Business Manager Bryan Stage and asked "if [Electrical Workers] could help [the Employer] in any way to resolve this issue." In a letter dated July 11, Stage informed the Employer's vice president, Bill Anderson, that the Employer's collective-bargaining agreement with Electrical Workers prohibited the use of nonmembers of Electrical Workers and required the use of Electrical Workers as the exclusive source of referral of applicants for employment. The letter stated that any breach of the agreement would result in a grievance filed against the Employer and that picket lines would be put up along the project. Stage concluded by stating that Electrical Workers would do what was necessary to protect the integrity of the collective-bargaining agreement and Electrical Workers' jobs. Stage then purchased picket signs that read "Thompson Electric–UNFAIR–IBEW #71" and discussed the possibility of picketing during a staff meeting. On July 18, the Employer filed a charge against Electrical Workers.

B. Work in Dispute

The notice of hearing described the disputed work as "the operation of heavy highway equipment along Interstate 90 in Lake County including the operation of augers affixed to line trucks, mini excavators and bob cats." At the hearing, the Employer and Electrical Workers requested a modification of that description of work by adding "other machinery," consistent with the description of work in the Employer's charge. Operating Engineers declined to stipulate to that description, claiming that it had no dispute with the Employer. The Employer's witnesses testified that its employees represented by Electrical Workers operate other types of equipment in addition to line trucks, mini-excavators, and Bobcats while installing and removing light poles, towers, and luminaries. And, as noted above, Taggart stated that

[2] Taggart did not testify at the hearing.

[3] In fact, as discussed below, the grievance was filed on June 12.

[4] See *Electrical Workers Local 71 (Thompson Electric, Inc.)*, 354 NLRB 344 (2009) (awarding Electrical Workers the disputed work of operating backhoes, mini-excavators, small directional borings, trenchers, line trucks, and other similar equipment related to the performance of electrical equipment installations, site grading, and pole placement and erection at the Steels Corner Interchange jobsite located in Stow, Ohio) (two-member decision).

[5] At the hearing, Operating Engineers' counsel indicated that its June 12 grievance was still pending.

"anything with wheels, tracks . . . was under [Operating Engineers'] jurisdiction." We find, based on the record, that the disputed work is the operation of heavy highway equipment, including augers affixed to line trucks, mini-excavators, Bobcats, and other machinery, along Interstate 90 in Lake County, Ohio.

C. Contentions of the Parties

Operating Engineers contends that the notice of hearing should be quashed because Operating Engineers has not claimed the disputed work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), Operating Engineers argues that it has pursued only a contractual grievance against Allega Cement for breaching the subcontracting clause in their collective-bargaining agreement. Operating Engineers also argues that the Employer is not the "innocent" employer, caught between two competing unions claiming the same work, for whom Congress intended to provide relief under Section 10(k). According to Operating Engineers, the Employer colluded with Allega Cement and Electrical Workers to fashion a sham jurisdictional dispute.[6]

The Employer and Electrical Workers oppose the motion to quash. They contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, as evidenced by Electrical Workers' threat to picket. They further contend that there are competing claims for the disputed work. In particular, they contend that Operating Engineers pressed its claim for the work directly to the Employer in a series of telephone discussions that included a request that the Employer sign an agreement with Operating Engineers or have Allega Cement employees operate the Employer's equipment.

On the merits, the Employer and Electrical Workers assert that the work in dispute should be awarded to employees represented by Electrical Workers based on the factors of certifications and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations. Additionally, the Employer contends that a broad, areawide award covering five counties in Ohio is warranted.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

1. Competing claims for work

We find reasonable cause to believe that both unions have claimed the work in dispute for the employees they respectively represent. Electrical Workers has claimed the work by its July 11 letter, objecting to the use of any nonmembers of Electrical Workers to perform the disputed work. Even absent this specific claim, the performance of the disputed work by Electrical Workers–represented employees constitutes evidence of a claim for the work. See *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 302, 303 (2010).

Despite its argument to the contrary, Operating Engineers has also claimed the disputed work. The Employer's Chief Estimator Mileski testified that Operating Engineers District Representative Taggart told him that Operating Engineers had an agreement with Allega Cement to operate all of Allega Cement's subcontractors' equipment and that "anything with wheels, tracks . . . was under [Operating Engineers'] jurisdiction." According to Mileski, Taggart suggested that the Employer could "have Allega [Cement's] people operate [the Employer's] equipment" as an option to resolve Operating Engineers' grievance against Allega Cement. See *Glass Workers (Olympian Precast, Inc.)*, 333 NLRB 92, 94 (2001) (union claimed disputed work by suggesting employer hire people out of its hall to do the disputed work to make the grievance against general contractor go away); *Laborers Local 860 (Anthony Allega Cement Contractor)*, 336 NLRB 358, 361 (2001) (union's request "couldn't we resolve this problem, couldn't he get his people working out here and do this work" was claim for work). Mileski further testified that Taggart asked the Employer to "join" Operating Engineers or sign a project labor agreement with Operating Engineers for the Lake County project. See *R&D Thiel*, above, 345 NLRB at 1139 (union's request to employer to sign an agreement to use its members for the job was claim for work); *Electrical Workers Local 702 (F. W. Electric, Inc.)*, 337 NLRB 594, 595 (2002) (business manager's statement that dispute would be resolved if employer became signatory to Laborers' agreement was claim for work given his other statements that laborers performed work elsewhere and wanted the disputed work). Thus, unlike the union in *Capitol Drilling Supplies*, Operating Engineers has done more than peacefully pursue a grievance against

[6] Operating Engineers does not set forth any contentions regarding the merits of the dispute.

a general contractor alleging that the general contractor was violating the subcontracting clause of its collective-bargaining agreement with the union. While Taggart's suggestions were a response to Mileski's question about the Employer's options to resolve the dispute, we find that Mileski's testimony is sufficient to establish reasonable cause to believe that Operating Engineers made a claim for the disputed work directly to the Employer. See *F. W. Electric*, above ("[A] true jurisdictional dispute arises when a union, seeking enforcement of a contractual claim, not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work.").[7]

2. Use of proscribed means

We also find reasonable cause to believe that Electrical Workers used means proscribed under Section 8(b)(4)(D) to enforce its claim to the disputed work when, in its July 11 letter, it threatened to engage in picketing if the Employer reassigned the disputed work. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). We find no merit in Operating Engineers' contention that Electrical Workers' threat to picket was the product of collusion among Allega Cement, the Employer, and Electrical Workers. The Board has consistently rejected claims of collusion where, as here, there is no affirmative evidence that the threat was not genuine or that it was the product of collusion. See *R&D Thiel*, above, 345 NLRB at 1140 (citing cases). The record contains, at best, evidence of cooperation among Allega Cement, the Employer, and Electrical Workers, and the Board has declined to find collusion on such grounds. See, e.g., *Laborers Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB No. 102, slip op. at 5 (2014) (no collusion where employer provided rival union's grievance to threatening union); *R&D Thiel*, above (no collusion where threatening union told employer's president that it wanted him "to file a 10(k)").

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of this dispute to which all parties are bound.

[7] We reject Operating Engineers' contention that a Sec. 10(k) proceeding is inappropriate here because the Employer is not an "innocent" employer but has unilaterally created the dispute, citing *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961). There, the Board held that when an employer unilaterally creates a dispute by transferring work away from the only group claiming the work, such conduct does not give rise to a jurisdictional dispute. Here, in contrast, there is no evidence that members of Operating Engineers have ever performed this kind of work for the Employer.

Because we find that all three prerequisites for the Board's determination of a jurisdictional dispute are established, we deny Operating Engineers' motion to quash the notice of hearing and find that this dispute is properly before the Board for resolution.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

The parties stipulated that the Employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute. As noted above, the Employer was bound to a collective-bargaining agreement with Electrical Workers at all times relevant to this dispute. The agreement covers traffic signal and highway lighting project work in Lake County, Ohio, and sets forth job classifications and wage rates for general foremen, foremen, traffic signal/lighting journeyman linemen, operators, groundmen, and equipment operators.

In contrast, it is undisputed that the Employer does not have a collective-bargaining agreement with Operating Engineers. Although Operating Engineers has a collective-bargaining agreement with Allega Cement, that agreement is not applicable because the company that ultimately controls and makes the job assignment is deemed to be the employer for purposes of a Section 10(k) proceeding. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB 1158, 1161 (2003) (finding that relevant agreement is one with employer with ultimate control over the assignment of the disputed work); *Elevator Constructors Local 91 (Otis Elevator Co.)*, 340 NLRB 94, 95–96 (2003) (same). Accordingly, we find that this factor favors an award of the disputed work to employees represented by Electrical Workers.

2. Employer preference and past practice

The Employer's chief estimator Mileski testified that Electrical Workers–represented employees were currently performing the disputed work and that the Employer prefers that this work remain with them. Mileski also testified that for more than 20 years the Employer has

operated equipment used to install and erect highway lighting and traffic signalization using Electrical Workers–represented employees. There is no evidence that the Employer has used employees represented by Operating Engineers to perform work of the kind in dispute. Accordingly, we find that this factor favors an award of the disputed work to employees represented by Electrical Workers.[8]

3. Area and industry practice

There was very little evidence presented of area and industry practice. The Employer's president Thompson testified that the Employer used Electrical Workers–represented employees to perform the disputed work at other projects in the area. Electrical Workers Business Manager Stage testified that area contractor L.E. Myers did not currently employ Operating Engineers on the electrical side of the business. Other than that, there is no evidence of the practice of other area employers, and no party introduced any evidence with respect to industry practice. Accordingly, we find that this factor does not favor an award of the work in dispute to either employee group.

4. Relative skills and training

The Employer and Electrical Workers presented testimony that employees represented by Electrical Workers possess the requisite skills and training to perform the disputed work and that they are experienced in doing so. Specifically, Thompson testified that based on his 34 years of working with Electrical Workers, he trusted that Electrical Workers–represented employees are "efficient, trained, skilled and productive." Mileski testified that from his 27 years' experience, members of Electrical Workers have skills necessary to perform the disputed work. In addition, Stage testified that Electrical Workers–represented employees have received on-the-job training to operate various types of equipment. On the other hand, Operating Engineers did not present evidence addressing whether its members possess the skills required to perform work of the kind in dispute, nor did it present any evidence of the training its members receive. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

5. Economy and efficiency of operations

The Employer presented testimony that it is more efficient and economical for the Employer to assign the disputed work to employees represented by Electrical Workers. Mileski testified that the Employer's employees use equipment of the type at issue here only 25 or 30 percent of the time. Thompson similarly testified that these employees usually operate equipment only 2–3 hours a day. Thompson also testified that Electrical Workers–represented employees not only operate equipment but also perform other tasks, such as installing electrical conduits, pulling wire, and building foundation forms. Operating Engineers–represented employees do not perform these additional tasks related to electrical work. See, e.g., *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 204 (2005) (the factor of economy and efficiency of operations favored Laborers where they were performing other work on the project aside from the disputed work). Therefore, we find that this factor favors an award of the disputed work to employees represented by Electrical Workers. See, e.g., *Luedtke Engineering*, above, 355 NLRB at 305.[9]

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Electrical Workers are entitled to perform the work in dispute.[10] We reach this conclusion based on the factors of collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Electrical Workers, not to that labor organization or its members.

Scope of Award

The Employer requests a broad, areawide award, covering the five counties in Ohio where it has performed

[8] Operating Engineers contends that the Employer's preference should be discounted because it is not based on legitimate interests. We reject this contention. As discussed below, the Employer's preference is supported by considerations of economy, efficiency, and skills and training, all of which are legitimate, traditional factors relevant to awarding work in dispute. Cf. *Miscellaneous Drivers Local 610*, 196 NLRB 1140, 1142 (1972) (discounting factor of employer preference because employer did not support preference with relevant considerations).

[9] The Employer also argues that using Electrical Workers–represented employees is more economical because it need not pay overtime for the hours exceeding 8 hours under its collective-bargaining agreement with Electrical Workers. The Board does not, however, consider wage differentials as a basis for awarding disputed work. See *Longshoremen ILA Local 1242 (Rail Distribution Center)*, 310 NLRB 1, 5 fn. 4 (1993). Therefore, we do not rely on any wage or overtime-pay differential in finding that the factor of economy and efficiency of operations favors awarding the disputed work to employees represented by Electrical Workers.

[10] Our award of the work in dispute to employees represented by Electrical Workers does not preclude Operating Engineers from pursuing its grievance against Allega Cement for violation of the Ohio Highway Heavy Agreement, provided that Operating Engineers does not continue to claim the work from the Employer or engage in threats or other coercion. See, e.g., *Olympian Precast*, above, 333 NLRB at 94 fn. 6; *J. P. Patti Co.*, 332 NLRB 830, 832 fn. 7 (2000).

outside electrical work using Electrical Workers–represented employees. The Employer contends that Operating Engineers has demonstrated a proclivity to claim the disputed work for employees it represents and to engage in conduct that violates Section 8(b)(4)(D), and that the dispute here is likely to recur.

We do not find that the record supports a broad, areawide award. "The Board will not impose a broad award in the absence of evidence demonstrating that the union against which the broad award will lie has resorted to unlawful means to obtain work and that such unlawful conduct will recur." *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335, 1338 (1993). Although the Board has previously found reasonable cause to believe that Operating Engineers has attempted to obtain forklift and skid steer work by conduct prohibited by Section 8(b)(4)(D),[11] there is neither an allegation nor any evidence that Operating Engineers engaged in proscribed conduct in this case.[12] Further, the record lacks evidence that Operating Engineers is likely to engage in proscribed conduct in a future dispute with any of the parties here. Accordingly, we shall limit the present determination to the particular controversy that gives rise to this proceeding.

[11] In *Laborers Local 894 (Donley's, Inc.) (Donley I)*, 360 NLRB No. 20 (2014), and *Operating Engineers Local 18 (Donley's, Inc.) (Donley II)*, 360 NLRB No. 113 (2014), the Board found reasonable cause to believe that Operating Engineers violated Sec. 8(b)(4)(D) in disputes involving Operating Engineers and Laborers locals in northeast Ohio.

[12] We observe that there is no binding prior determination by the Board involving disputes between the parties in this case. *Thompson Electric*, above, 354 NLRB at 344, was a decision issued by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (holding that the Board cannot operate with fewer than three members).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Thompson Electric, Inc. represented by International Brotherhood of Electrical Workers Local Union 71 are entitled to perform the operation of heavy highway equipment, including augers affixed to line trucks, mini-excavators, Bobcats, and other machinery, along Interstate 90 in Lake County, Ohio.

Dated, Washington, D.C. June 30, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD